Supreme Court, U. S.
FILED
SEP 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

No. 79-1844

DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF WASHINGTON, et al.,

*Petitioners,*

v.

THURSTON COUNTY, et al.,

*Respondents.*

## PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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### INTRODUCTORY STATEMENT

Pursuant to Rule 22, petitioner Department of Natural Resources of the State of Washington files this reply brief to address arguments made by Thurston County to which we have not yet had the opportunity to respond. The Department of Natural Resources desires to briefly state its position regarding the significance of *Agins v. City of Tiburon*, 65 L. Ed. 2d 106 (decided June 10, 1980), because this decision was not handed down at the time our petition for a writ of certiorari was filed.

## ARGUMENT

### A. The Department of Natural Resources and its lessee were not afforded the opportunity to present evidence in a judicial forum on the taking issue.

Thurston County contends that the Department of Natural Resources and its lessee have had at least three opportunities to present evidence on the taking issue in the course of proceedings and failed to do so. (Respondents' brief in opposition, page 5). This statement is simply untrue. The Department of Natural Resources and its lessee, Lake Lawrence, Inc., found it necessary to petition the superior court requesting judicial relief for damages arising from Thurston County's denial of the requested plat under the guise of "public interest." (A-94 - A-100, Application for Writ of Mandamus, Damages, Attorney's Fees and Costs).[1] The paramount issue raised by our petition for a writ of certiorari involves the question of the "taking or damaging" effect of Thurston County's action in denial of the requested plat. Until such time as Thurston County's decision became final, it would have been premature for either the Department of Natural Resources or its lessee to have challenged possible county action in a court of competent jurisdiction. This action was brought after final denial of application for plat approval and refusal to issue the requested substantial development permit as ordered by the State Shorelines Hearings

[1]References are to appendix material in the companion appeal, *Lake Lawrence, Inc. v. Thurston County*, October Term, 1979, Docket No. 79-1880.

Board. (Trial Court Finding of Fact 2.6 and 2.7, A-120 and A-121). Further, Thurston County's suggestion that the Department of Natural Resources and its lessee should have presented evidence and arguments on the "taking and damaging" effect of a possible county decision to the county itself defies logic. Suffice it to say that "appropriate means" were sought to review Thurston County's action in this case. (State Supreme Court Opinion, A-190).

B. **The parties' stipulation does not preclude consideration of the "taking" issue.**

Thurston County accuses the Department of Natural Resources of making a "misstatement as to the stipulation" (Respondents' Brief in Opposition, page 7). The county argues that the legal effect of the stipulation was to preclude the Department of Natural Resources and its lessee from litigating the taking issue. The problem of just who is making a misstatement should be resolved by considering that the stipulation relates solely to the first cause of action—Thurston County Cause No. 58623—and not to the second cause of action in which challenge was made to the county's "taking" of the property in question by virtue of its decision based upon the alleged need to preserve eagle habitat. Thurston County Superior Court Cause No. 59975 is the mandamus action which raises the "taking or damaging" issue. The trial court entered an order consolidating the two separate actions on July 6, 1978 (A-111)

which is the *same day* as the stipulation was executed by counsel for all parties.

A further point deserves mention. Thurston County's belated perception of the legal significance of the stipulation overlooks its very terms. The stipulation (A-107 through A-109) provides:

> "3. If the answer to the issue posed in item (1) above is in the negative (that is the Board of County Commissioners is found without constitutional and legislative authority to make the decision it did), *then the matter of damages of the petitioner* will be scheduled for a separate hearing before the court, without prejudice to any defense, legal or equitable, which may be raised by respondents herein." (Emphasis supplied)

The authority of Thurston County to deny the requested plat upon environmental grounds already litigated before the State Shorelines Hearings Board was the first question to be decided. All questions relating to damages arising from the county's action were to be resolved at a separate hearing to be held at a later date.[2] This is the plain import of the language used. The suggestion that the stipulation precluded later consideration of the taking issue is at variance with fact.

**C. *Agins v. City of Tiburon*, 65 L. Ed. 2d 106, (decided June 10, 1980), confirms the presence of a substantial federal question raised in this case.**

Subsequent to filing the petition for a writ of

[2]In fact this hearing has never been held. This is the gist of the relief sought by the Department of Natural Resources. The court below erred by resolving the taking and damaging issue against petitioner without an evidentiary base.

certiorari to the Washington State Supreme Court in this case, *Agins v. City of Tiburon, supra,* was handed down. While the Court in *Agins* held that there was no controversy regarding specific application of the City zoning ordinance, the long settled and established constitutional principles relative to this issue were discussed.

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land * * * The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken * * * the question necessarily requires a weighing of private and public interests. (65 L. Ed. 2d at 112; citations omitted)
> * * *
>
> "Although the (zoning) ordinances limit development, they neither prevent the best use of appellants' land, * * * nor extinguish a fundamental attribute of ownership * * *"
> (65 L. Ed. 2d at 113; insert by author)

It is not contested that the State Shorelines Hearings Board found that Wood Point is only an incidentally used perching area for eagles and is not critical or important to their habitat needs. (Board decision, A-57, *et seq.*; Trial Court Finding of Fact 2.6, A-120 and A-121). The Department of Natural Resources suggests that Thurston County's action is a taking

because it does not substantially advance a legitimate state interest. Under these circumstances, the county's act of holding additional hearings and making independent and contradictory findings regarding alleged critical eagle habitat ought to mean that the public at large rather than the property owner should bear the burden of the dedication of this land to this public use, *i.e.*, preservation for eagle habitat. Thurston County's denial of the requested plat and refusal to issue the substantial development permit as ordered by the State Shorelines Hearing Board was a final decision based upon a specific proposal for residential development of Wood Point. It was not, as the State Supreme Court said, a decision which "* * * left open the possibility of an alternate cluster configuration for the development—a configuration specifically favored by the County's Comprehensive Plan." (A 199) This is not so. The trial court entered an unchallenged finding of fact pertinent to the finality issue:

> "2.7 *Alternative Conditions.* After denying petitioners' application for plat approval and refusing to issue the requested substantial development permit as ordered by the Shorelines Hearings Board, respondent Board of County Commissioners thereupon entered 'alternative' findings regarding the requested plat approval. These new 'alternative' conditions would apply to the requested plat only if a court reversed their decision to deny it." (A-121)

Thurston County has done nothing more than indicate an expression of a possible future intent

should a renewed request be made by petitioner or its lessee. Thurston County attempted to rezone Wood Point during the pendancy of judicial proceedings below to a "conservancy" status. The County's attempted rezone was enjoined by the trial court. (A-41 through A-43)[3] Thurston County has denied a requested plat which meets all of the objective criteria of their platting ordinance (Trial Court Finding of Fact 2.6, A-120). The Department of Natural Resources and its lessee have been prevented from developing and using Wood Point in a manner consistent with the general zoning ordinance authorizing residential development as a "rural use." (Trial Court Finding of Fact 2.1, A-119).

[3]The County's continuing effort to rezone Wood Point is shown by the statement filed by the director of its planning department November 5, 1979. (A-241 and A-242). See also: Order Denying Application for Writ of Prohibition signed by the Chief Justice of the Supreme Court of Washington (A-243 and A-244).

## CONCLUSION

In our request for review the Department of Natural Resources has demonstrated there is a substantial federal question regarding the ability of Thurston County to impose land use restrictions which would severely reduce the future income stream from these federal trust properties. We suggest that the State Supreme Court was in error in denying the Department of Natural Resources standing, as trustee of such land, to contest the imposition of use restrictions based on alleged need to protect eagle habitat.[4] We further demonstrated that both the Department of Natural Resources and its lessee are entitled by the Fifth Amendment and the Fourteenth Amendment to protections against the taking and damaging of their legitimate property interests without compensation and without an opportunity in a judicial proceeding to challenge the land use restriction. The recent decision of this Court in *Agins v. City of Tiburon, supra,* suggests that application of environmental restraints upon the proposed development of the school trust land would equate to a "taking" in the constitutional sense. Petitioners will not share with other adjacent property owners in the benefits and burdens of the County's exercise of power to impose environmental prohibitions for the alleged protection of eagles. School trust land was singled out by the County for preservation. A substantial federal question is presented in a case such

[4]See: *Alamo Land & Cattle Co., Inc. v. State of Arizona,* 424 U.S. 295, 47 L. Ed. 2d 1, 96 S. Ct. 910 (1976).

as this where the effect of the County's decision is to preclude any practical human use of Wood Point. (Trial Court, memorandum opinion, A-116 and A-117).

For these reasons, the judgment of the Supreme Court of Washington should be reviewed and reversed. The court below should be directed to remand this proceeding to the trial court for a full evidentiary hearing on the "taking and damaging" issues.

DATED this 19th day of September, 1980.

Respectfully submitted,

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